

Book Reviews

Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*. Hart Publishing, 2016, 488 pages, ISBN: 978-1-84946-544-1, £ 75.

In March 2014 legal scholars from all over Europe met in Oxford upon the invitation of Dr. Dorota Leczykiewicz and Professor Stephen Weatherill to discuss how EU-law “pictures” the consumer.¹ The diversity in consumer images is a popular research theme among scholars.² Since teaching duties prevented me from attending the conference, I was looking forward to the publication of the conference volume. I was not disappointed. After reading the book I regretted even more not having been able to take part in what must have been some very inspiring discussions. The book, which has been dedicated to the very much missed Professor Norbert Reich, is of great value to both legal scholars and practitioners, more specifically those involved in shaping, applying and enforcing consumer law in Europe.

The introductory chapter by both editors outlines the research project that resulted in the conference and accompanying volume. The search for “images” of the consumer is not confined to EU-consumer law but has been extended to EU-law in general, including intellectual property law, free movement law and competition law; areas which do not primarily aim at protecting the consumer. Several chapters pay attention to the Charter of Fundamental Rights and the constitutionalisation of private law and, I believe this is rightly so. The search for consumer images goes through various regulatory and deregulatory processes and is not restricted to legislative (positive) harmonisation. Images are the product of both our eyes and our minds and the concept of the consumer that lies at the heart of the book is not limited to projections of the consumer but also pertains to actual consumers. The table of contents unfortunately does not subcategorize the different contributions. Although the introductory chapter provides some structure to the volume by categorizing the various contributions, a classification of the contributions in the table of contents would have been welcomed.

Not surprisingly, several contributions address the concept of the reference consumer in consumer law, as well as its shortcomings (paragraphs III and IV of the Introduction). The well-known image of the vulnerable consumer and that of the confident consumer as well as their strained relationship are largely dealt with, in both descriptive and analytical ways. Freedman (chapter 19) provides valuable insights in the history of EU consumer policy and unveils the vulnerable consumer as its “unstated” starting point. Reich (chapter 5) defines the concept of vulnerability before assessing the need to define the place and scope of this concept and its impact on party autonomy. Twigg-Flesner (chapter 7) points to the fact that the paternalistic nature of EU regulation (mandatory rules, *ex officio* application) is at odds with the image of a confident consumer it is based on and aims at. Weatherill (chapter 8) details how EU-law both empowers the consumer and recognizes the limits of this empowerment. Grundmann (chapter 9) elaborates on the notion of weakness in contract law and questions its restriction to consumers, raising the important question of the protection of small traders. Behavioural economics and their desirable influence on regulation are discussed by Ramsay (chapter 6), who advocates reasonable access to consumer credit, and by Howells (chapter 18), who takes a critical stance on the maximum harmonizing UCPD and calls for more protective rules.

The editors also distinguish two groups of chapters which explore the interaction between the (actual) consumer, her interests, and policy-making, legislative, and regulatory processes at EU-level (paragraphs II and V of the Introduction). The first group of chapters measures the gap between some EU-policies and the consumer. In the field of competition and energy law, the consumer is being depicted as “a distant beneficiary of EU-policy” (resp. Albors-Llorens and Jones, chapter 3 and Johnston, chapter 4). The second group of chapters assesses the actual involvement of consumers into regulatory processes and concentrates on the image of a participating consumer (Micklitz, chapter 2, Hodges, chapter 10 and Leczykiewicz, chapter 11). These chapters have in common that they do not focus around one particular image of the consumer and that they are critical of the lack of attention to diverging consumer interests in legislative and regulatory processes. In the cases of competition and energy law, the vision of the consumer is even considered to be “over inclusive” (p. 8).

A third group of contributions deals with the relation consumers have to consumption and puts forward the image of an “ethical consumer” (Miller, chapter 12, Collins, chapter 13 and Davies, chapter 14). Davies even directs some fundamental criticism to the reduction of the EU-citizen to a mere consumer and, as a matter of fact, to the reduction of the EU to an internal market, regulated by free movement law. Those chapters are largely normative and the consumer image they convey is created more by the authors than by EU law or regulation as such.

The last group of chapters concerns the methods of constructing the image of the consumer (Dinwoodie and Gangjee, chapter 15, Mak, chapter 16 and De Vries, chapter 17). These contributions try to answer the fundamental question as to how and why (with what aim) one or more (generally conflicting) images arise in different areas of EU law. These chapters reach at the core of the research project and enable the reader to critically assess the coming into being (and not only the existence) of consumer images, and to understand the discrepancies existing throughout EU law.

One point of criticism would be that, as is often the case with conference volumes, the categorization provided by the introduction appears to have been made in retrospect. It comes across as quite eclectic. The volume as a whole lacks a clear structure, with tightly defined research questions. This can be explained by the fact that the methodological approach of the project is not made explicit. Maybe the view of legal philosophers could have added a theoretical dimension to it. Even though the introduction anticipates on the conclusions of the various contributions by answering the question “who is the EU consumer?”, I have missed a concluding chapter at the end of the volume wherein key research questions would have been answered in an integrated and structured way.

That being said, there is a lot we can learn from the various contributions and approaches chosen in the volume. The broad outline of the project confirms what was already clear from a mere ERPL perspective (Micklitz, Mak): multiple and contrasting consumer images and degrees of protection indicate a lack of vision on EU consumer policy (Howells). Many contributions point to the need for more protection and for a readjustment of

1 <https://www.law.ox.ac.uk/images-consumer-eu-law-legislation-free-movement-and-competition-law>

2 Cf. the interdisciplinary workshop on “Consumer images” organised on February 12th and 13th 2014 by the Law Faculty of the Ruhr Universität Bochum.

the projected image of a well-informed consumer. More importantly, although most contributions relate to private law, the diverse contributions without a focus on ERPL (Albors-Llorens and Jones, Johnston, Miller, Davies, Dinwoodie and Gangjee, De Vries) offer those with such a focus a broader and disheartening view on whether more consistency can be achieved throughout EU law. So it appears that consumers have many different faces and that a consumer cannot just be reduced to the act of consuming. Both the benchmarks of the vulnerable (Reich) and the (fiercely criticized) average consumer (Weatherill, Howells) seem to be useless as coherence enhancing regulatory techniques.

A very striking conclusion is that the actual person behind the consumer – the individual citizen and member of a community – is gaining in importance in the prevailing multi-governance mod-

el. Could this “image” be the future of EU policy- and law-making? And would the EU be willing to pay the price, being either less (maximum) harmonisation or at least an increased level of democratic accountability? This is highly doubtful. The proposed new Digital Single Market contract law directives based on maximum harmonization, tightly hold onto the image of an autonomous consumer, who is encouraged to enter the internal market, without paying much attention to the actual needs and preferences of individual consumers.

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EuCML Notices

CJEU: Case Law

The following overview is not an exhaustive list. Legislation is cited in the abbreviated form. Emphasis by the author.

I. Requests for a preliminary ruling

1. *Case C-434/16 (Peter Nowak v Data Protection Commissioner)* – 4.8.2016 – *Supreme Court (Ireland)*

(Directive 95/46/EC – protection of personal data)

2. *Case C-415/16 (David Fernando Leal da Fonseca v Varzim Sol – Turismo, Jogo e Animação, SA)* – 27.7.2016 – *Tribunal Judicial da Comarca do Porto (Portugal)*

(Directive 93/104/EC – Directive 2003/88/EC – organization of working time – Freedom of movement for workers)

3. *Case C-357/16 (UAB ‘Gelvora’ v Valstybinė vartotojų teisių apsaugos tarnyba)* – 28.6.2016 – *Lietuvos vyriausiosios administracinės teismas (Lithuania)*

(Directive 2005/29/EC – unfair business-to-consumer commercial practices in the internal market – Scope- Notion of ‘product’)

II. Opinions

1. *Case C-568/15 (Zentrale zur Bekämpfung unlauteren Wettbewerbs Frankfurt am Main)* – 10.11.2016 – *ECLI:EU:C:2016:863* – *Advocate General: Maciej Szpunar*

(Directive 2011/83/EU – Consumer protection – Communication by telephone – Operation of a telephone line by a trader to allow consumers to contact him in relation to the contract concluded – Prohibition on applying a rate higher than the basic rate – Concept of ‘basic rate’)

2. *Case C-562/15 (Carrefour Hypermarchés SAS v ITM Alimentaire International SASU)* – 19.10.2016 – *ECLI:EU:C:2016:781* – *Advocate General: Henrik Saugmandsgaard Øe*

(Reference for a preliminary ruling – Misleading advertising – Comparative advertising – Directive 2006/114/EC – Article 4

(a) and (c) – Advertising comparing the prices of products sold in shops having different formats or sizes – Permissibility – Unfair commercial practices – Directive 2005/29/EC – Article 7 – Misleading omission – Material information)

3. *Case C-375/15 (BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation)* – 15.9.2016 – *ECLI:EU:C:2016:695* – *Advocate General: Michal Bobek*

(Approximation of laws – Directive 2007/64/EC – Payment services in the internal market – Framework contracts – Prior general information – Information relating to changes to the conditions of framework contracts – Requirement to provide information on a durable medium – Information ‘provided’ or ‘made available’ – Transmission of information through the mailbox of an internet e-banking website)

4. *Case C-339/15 (Openbaar Ministerie v Luc Vanderborght)* – 8.9.2016 – *ECLI:EU:C:2016:660* – *Advocate General: Yves Bot*

(Reference for a preliminary ruling – National legislation prohibiting providers of dental care from advertising their services to the public – Compatibility – Articles 49 TFEU and 56 TFEU – Freedom of establishment – Freedom to provide services – Directive 2000/31/EC – Electronic commerce – Scope – Article 3(3) – Exclusion of national provisions relating to health – Article 3(8) – Exclusion of national provisions governing regulated professions – Directive 2005/29/EC – Unfair commercial practices – Article 3(1) – Internal market clause – Applicability of the legal system of the service provider’s Member State of establishment – Article 8 – Restriction on freedom to provide information society services in order to ensure compliance with professional rules)

III. Judgments

1. *Case C-149/15 (Wathelet)* – 9.11.2016 – *ECLI:EU:C:2016:840*

(Reference for a preliminary ruling – Directive 1999/44/EC – Sale of consumer goods and associated guarantees – Scope – Concept of ‘seller’ – Intermediary – Exceptional circumstances)